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In the
Supreme Court of the United States
October Term, 1998

HORWATH ASSOCIATES,
a California general partnership,

Petitioner,

v.

CITY OF EAST PALO ALTO and
EAST PALO ALTO RENT STABILIZATION BOARD,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a land-use regulation effects a temporary taking of private property, is compensation available for the time required to obtain a judicial determination of the regulation's invalidity?

2. Where a land-use regulation effects a taking on the ground that it fails to substantially advance a legitimate state interest, is compensation available for a temporary taking even if some economically viable use of the land remains?

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PETITION FOR WRIT OF CERTIORARI

Horwath Associates (Horwath) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on April 30, 1996.

OPINIONS BELOW

The orders of the California Supreme Court granting and then dismissing Horwath's petition for discretionary review are unreported; they appear at Appendices C and E to the petition, respectively. The opinion of the California Court of Appeal is unreported; it appears at Appendix A to the petition. The decision of the trial court is unreported; it appears at Appendix B to the petition.

JURISDICTION

The judgment of the California Court of Appeal was entered on April 30, 1996. Petition Appendix (Pet. App.) at A-1. Horwath's timely petition for discretionary review to the California Supreme Court was originally granted on July 17, 1996. Pet. App. at C-1. Subsequently, in an order dated July 8, 1998, the California Supreme Court dismissed Horwath's petition for review. Pet. App. at E-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND REGULATIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Regulation 1241 of the East Palo Alto Rent Stabilization Board provides:

> If the board fails to render a final decision on a landlord's petition for a rent adjustment within 110 days from the date of filing, the petition shall be deemed granted in the amounts requested on the petition on the 111th day following the date of the filing of the petition.

STATEMENT OF THE CASE

A. Facts and Administrative Proceedings

Petitioner Horwath Associates (Horwath) is a family partnership that used to own apartment buildings in the City of East Palo Alto, California (City), a working-class community in the San Francisco Bay Area. *See* Pet. App. at A-2. Before it lost these apartments to foreclosure during an earlier stage of the present litigation, Horwath was subject to respondent City's rent-control ordinance, which is administered by respondent East Palo Alto Rent Stabilization Board (Board). *See* Pet. App. at A-1 n.1. That ordinance was enacted in 1983, after Horwath purchased the apartment buildings. *See* Pet. App. at A-2. As noted by the court below, "[d]uring the course of Horwath's ownership, the rents which it received were insufficient to meet the expense of owning the buildings." *Id.* In a word, the rents allowed under the City's ordinance were confiscatory. Accordingly, as was its right under the United States Constitution as well as under the ordinance, Horwath in 1989 filed petitions with the Board seeking permission to increase the rents it could legally charge for its apartment units. *See id.*

Consistent with the requirements of the Constitution as interpreted by this Court and by the California courts, the ordinance and its implementing regulations required the Board to act on Horwath's petition within a fixed period of time. If the Board did not act on the petition within 110 days, the Board's own regulations required it to certify new rents at the requested levels. *See* Rent Board Regulation 1241, *quoted at* p. 2 *supra*.

Faced with this mandate designed to ensure that landlords would not be forced to long endure confiscatory rental rates, the Board did not comply. Rather, as the court below described it, "the Board did not make any decision, and it did not respond to Horwath's request to issue rent certificates authorizing [the requested] rent increases as required by Regulation 1241." Pet. App. at A-2 to -3. Because Horwath could not legally raise its rents without the certificates, it was forced to sue the City and the Board to obtain the certificates to which it was indisputably entitled. Respondents "replied to the [complaint] by admitting that the Board did not render its final decision within 110 days of filing as required by Regulation 1241." Pet. App. at B-3. Respondents defended the (in)action of the Board solely on the ground that the regulation was "constitutionally invalid," while admitting that they had not repealed the supposedly unconstitutional provision nor did they have "any plans to do so." *Id.* The state trial court granted judgment to Horwath; the Board "was ordered to 'promptly issue new rent certificates' at the level requested in Horwath's petitions." Pet. App. at A-3.

Despite the mandate to act "promptly," the Board took an additional *five weeks* to actually to issue the certificates. *See* Pet. App. at B-3, B-8 (judgment issued by court on June 27, 1990; certificates issued by Board on August 1, 1990). After giving the 30-day notice of a rent increase as required by law, "Horwath raised the rents on some of the units but eventually lost the properties to the primary lender because of recurring defaults." Pet. App. at A-3. All told, respondents' legally unjustifiable inaction resulted in "a delay of approximately six

months" in Horwath's ability to increase rents. Pet. App. B-8. This delay contributed to Horwath's inability to meet its loan obligations on the apartment buildings and, ultimately, to the loss of the apartments through foreclosure. This loss occurred despite Horwath's partners having contributed some $500,000 to the venture during this period. *See* Pet. App. at B-9, B-10 (noting additional capitalization of $100,000 and contributions of $200,000 each from two partners).

B. The Proceedings in the Trial Court

Thereafter Horwath brought the present inverse condemnation action against respondents in California Superior Court, seeking damages for a taking of its property in violation of the Takings Clause of the United States Constitution and its state analogue. *See* Pet. App. at A-1. After a trial, the superior court issued a decision finding that "the failure of the City/Board to comply with their own ordinance and regulations . . . caused a *temporary* 'taking' of property and even a temporary 'taking' requires just compensation." Pet. App. at B-14 (citing *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987)). Accordingly, the trial court awarded Horwath $28,032, or $4,672 for each of the six months that respondents failed to issue the rent certificates to which Horwath was entitled. Pet. App. at B-15.[1]

C. The Decision of the Court of Appeal

On appeal, the California Court of Appeal, First Appellate District, reversed. That court acknowledged that "the Board

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[1] The trial court did not award Horwath any damages for a *permanent* taking, ruling that Horwath's complete loss of its rental property was due to a number of factors in addition to respondents' unlawful conduct. *See* Pet. App. at B-13 to -14. None of these factors, however, mitigates respondents' liability for the *temporary* taking resulting from respondents' failure to comply with their own regulations. In any case, the court of appeal noted the existence of these factors but did not rest its decision on that ground. *See* Pet. App. at A-4.

failed to act on Horwath's request for a rent increase within the time limit imposed by [the Board's] regulation." Pet. App. at A-6. It further acknowledged that this time limit constituted a "protection[] built into the regulation to protect the applicant from unreasonable delay on the part of the Board." Pet. App. at A-8. Finally, the court observed that the delay imposed on Horwath by respondents' failure to act on the request was both "unwarranted" and "unnecessary." Pet. App. at A-7, A-9.

Notwithstanding these points, the court of appeal criticized the trial court's "simplistic" belief that "a compensable temporary taking of property occurred [during the time] until the Board's inaction was successfully challenged in court and the higher rents were put in place." Pet. App. at A-6. In particular, the court of appeal rejected the trial court's reliance on *First English*. First, the court of appeal characterized the present case as "involv[ing] a delay attributable to the normal workings of governmental and legal processes, a situation *First* [*English*] expressly declined to address." Pet. App. at A-11; *accord* Pet. App. at A-9 (opining that "the delay to which Horwath was subjected is the same kind of delay that commonly occurs while government-imposed processes run their course, which have not traditionally been viewed as constituting a compensable taking"). In addition to finding that *First English* did not apply because the delay was "normal," the court of appeal found that decision inapplicable because "the challenged delay did not deny Horwath all economically beneficial or productive use of its property." Pet. App. at A-9.

In reaching these conclusions and vacating the compensation award to Horwath, the court of appeal expressed concern that awarding temporary takings damages in cases like this one would result in a state of affairs in which "the financial burden on local governments will become overwhelming and scarce public resources will be dissipated at an alarming rate." Pet. App. at A-10. According to the court, "[t]hese funds are better put to public use."

Horwath sought review of the appellate court's decision in the California Supreme Court. That court originally granted review on July 17, 1996. *See* Pet. App. at C-1. On November 24, 1997, the court entered an order deferring further action in the case pending disposition of *Landgate v. California Coastal Commission*, subsequently decided and reported at 953 P.2d 1188 (1998), *petition for cert. pending*, No. 98-183.[2] *See* Pet. App. at D-1. Finally, on July 8, 1998, after *Landgate* had been decided, the California Supreme Court dismissed review of the present case. *See* Pet. App. at E-1.

REASONS FOR GRANTING THE PETITION

Horwath suffered a compensable taking of its rental property when respondents failed to grant Horwath's petition for an adjustment of its rents. Because respondents deliberately decided not to respond to Horwath's petition and because that non-response was completely lacking in legal justification, respondents' actions imposed a long-continued and unreasonable delay in putting an end to confiscatory rates and failed to substantially advance a legitimate state interest, either of which is sufficient to establish a compensable temporary taking.

The court below ruled to the contrary on the grounds that compensation for a temporary taking is not available for time spent in litigation to establish the invalidity of official action and that such compensation is not available if some economically viable use of the property remains. In so ruling, the court below decided an important question of takings law in a way that conflicts with the relevant decisions of this Court and with the decisions of other federal and state courts.

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[2] *Landgate* raises closely related issues concerning the proper application of this Court's temporary takings jurisprudence. Joining with amici Pacific Legal Foundation and Lechuza Villas West, Horwath filed a brief amici curiae in support of the *Landgate* petition.

I

HORWATH SUFFERED A COMPENSABLE TAKING OF ITS RENTAL PROPERTY

Under either of two applicable tests, Horwath suffered a compensable temporary taking of its apartment buildings as a result of respondents' application of the City's rent-control ordinance.

A. Horwath Suffered a Compensable Taking Because the Application of the City's Rent-Control Ordinance Imposed a "Long-Continued and Unreasonable Delay in Putting an End to Confiscatory Rates"

As established by this Court in *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591 (1926), an ordinance effects a compensable taking of private property for public use when it imposes on the property owner a "long-continued and unreasonable delay in putting an end to confiscatory rates." Though it originated in a now-suspect judicial era, the *Smith* standard—and particularly its application to rent-control ordinances—is hardly controversial, having been acknowledged and applied by the California courts for the past two decades.[3]

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[3] Thus, in *Birkenfeld v. City of Berkeley*, 130 Cal. Rptr. 465, 493 (1976), the California Supreme Court relied on *Smith* to strike down a rent-control ordinance on the ground (among others) that the ordinance was not "capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary." *Accord Carson Mobilehome Park Owners Association v. City of Carson*, 197 Cal. Rptr. 284, 288 (1983) (reaffirming reliance on *Smith* and ruling that a rent-control ordinance effects a taking when the ordinance's rent-adjustment mechanism produces a delay that is "longer than practically necessary to achieve the legitimate purposes of the legislation").

The California courts continue to apply these principles, being careful to sustain rent-control ordinances against takings challenges

(continued...)

Horwath suffered a taking under the *Smith* standard when respondents failed to "put[] an end" to the confiscatory rates from which Horwath sought administrative relief in late 1989. *Smith*, 270 U.S. at 591. The delay resulting from respondents' failure in this regard was "long-continued and unreasonable" virtually by definition. *Id.* The delay was long-continued because it continued far longer than any delay previously upheld by the California courts in cases applying the *Smith* standard. *See supra* n.3. Indeed, in the absence of judicial intervention, the respondents' delay would have continued *forever*. Moreover, the delay was unreasonable because it had absolutely *no reason* behind it. As the trial court found: "The City and its Board further acknowledge that neither at the time [Horwath's rent-adjustment petition was filed] nor in this trial has *any good cause* been shown . . . for any delay beyond the mandatory time limits" of the ordinance. Pet. App. at B-5 (emphasis added).

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[3] (...continued)
only when the ordinances establish a fixed and relatively short period to act upon the requested adjustment. *See id.* at 288-89 (upholding an ordinance because a request for a rent adjustment would be granted if the rent board did not act upon the request within 105 days); *Fisher v. City of Berkeley*, 209 Cal. Rptr. 682, 716 (1984) (reaffirming the *Smith* standard and upholding a rent-control ordinance because it "impose[d] a time limit of 120 days on all decisions on landlord petitions" for rent increases), *aff'd on grounds not relevant here*, 475 U.S 260 (1986); *Oceanside Mobilehome Park Owners' Association v. City of Oceanside*, 204 Cal. Rptr. 239, 248 (Ct. App. 1984) (upholding rent-control ordinance because there were no more than "approximately 110 days between the date of the submission of the application and the effective date of any rent increase"); *Baker v. City of Santa Monica*, 226 Cal. Rptr. 755, 764 (Ct. App. 1986) (upholding rent-control procedures because the rent board "is not only required to make a final decision within 120 days, but does so as a matter of practice" (footnote omitted)), *appeal dismissed*, 479 U.S. 1073 (1987). *Cf.* Rent Board Regulation 1241 (providing that a rent adjustment request shall be deemed granted if the Board does not act upon the request within 110 days), *quoted at supra* p. 2.

Furthermore, the court of appeal conceded that the delay wrought by the Board's inaction was "unnecessary." Pet. App. at A-9. An *unnecessary* delay is per se unreasonable because it is inherently longer or greater than "practically necessary." *See Carson*, 197 Cal. Rptr. at 288 (holding that a delay effects a taking under *Smith* if such delay is "longer than practically necessary"); *Birkenfeld*, 130 Cal. Rptr. at 494 (holding that a delay effects a taking under *Smith* if it is greater in "incidence and degree . . . than is practically necessary"). For these reasons, Horwath suffered a compensable taking of its property under the *Smith* standard when respondents failed to act upon Horwath's petition for a rent adjustment.

B. Horwath Also Suffered a Compensable Taking Because the Application of the Rent-Control Ordinance Failed to Substantially Advance a Legitimate State Interest

Although the *Smith* standard should suffice to establish that Horwath's property was taken, any doubt is removed by considering the more modern standard laid down by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1960), and reaffirmed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992): "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests . . . .'" *Id.* at 1016 (quoting *Agins*, 447 U.S. at 260). Although a government agency may have a legitimate interest in taking a reasonable amount of time to review and analyze the data submitted with a rent-adjustment petition before acting on that petition, it cannot have a legitimate interest in taking an *unlimited* amount of time to act on a petition.

In the present case, as set forth above, respondents did not articulate *any* justification for their actions, let alone a justification that would satisfy the first prong of the *Agins* test. Again, the court below found respondents' actions to be "unnecessary" as well as "unwarranted," Pet. App. at A-9, the exact opposite

of government actions that substantially advance a legitimate state interest.[4] Because the actions of respondents both failed to substantially advance a legitimate government interest and resulted in a long-continued and unreasonable delay in putting an end to confiscatory rental rates, Horwath suffered a compensable taking of its rental property.

II

IN RULING TO THE CONTRARY, THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF TAKINGS LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *FIRST ENGLISH*

In the face of these unremarkable conclusions, the California Court of Appeal's holding that Horwath did not suffer a compensable taking is astonishing. The court gave essentially two reasons for that holding, both of which conflict with this Court's decision in *First English*, which held that where government conduct has already effected a taking, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321.

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[4] We do not mean to suggest by this point that a taking occurs any and every time a government agency's conduct fails to conform to state law. As the court of appeals pointed out, however, the regulation flouted by the Board was a regulation intended "to protect the [rent-adjustment] applicant from unreasonable delay on the part of the Board." Pet. App. at A-8 (citing the decisions discussed in the previous section). Or, as the trial court put the point, that regulation "provide[s] reasonable time limits within which the City/Board must dispose of a rent increase application pursuant to the rules laid down in *Birkenfeld* [and its progeny]." Pet. App. at B-5. In this situation at least, where the state-law obligation violated by the agency is consciously intended to be a means of enforcing federal constitutional norms (particularly Fifth Amendment norms), the agency can hardly claim with any justification that it has a "legitimate" interest in violating that obligation.

A. Denial of Compensation for Time Spent in Litigation

In the first place, the court below held that "the delay to which Horwath was subjected is the same kind of delay that commonly occurs while government-imposed processes run their course," that is, "a delay attributable to the normal workings of governmental and legal processes." Pet. App. at A-9, A-11. This kind of delay, reasoned the court, comes within the category of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," which *First English* arguably excluded from its compensation mandate. 482 U.S. at 321. Whether or not *First English* actually intended to exempt "normal delays" from the requirement that compensation be paid for temporary takings is debatable. But it should not be open to question that the category of normal delays does *not* include the time required to obtain a judicial determination of the validity of a land-use regulation. Several considerations establish this point.

First, the text of the relevant passage from *First English* spoke not of "normal delays" in the abstract, but rather normal delays in "obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* It is common sense that the unnamed items included in the catchall phrase "and the like" necessarily share the character of the named items. Or, to use the language of statutory construction: "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & Western Railway Co. v. American Train Dispatchers Association*, 499 U.S. 117, 129 (1991). The character, or subject, of building permits, zoning, and variances is *administrative* —they concern the process leading up to the "final [agency] decision" that is necessary to ripen a federal takings claim. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). By definition, *post*-final decision litigation

does not partake of an administrative character. Accordingly, the delays resulting from such litigation are not "normal" as that term is used in *First English*.

Second, any doubts about this conclusion are wiped away when one broadens one's consideration to include the *First English* dissent. There, Justice Stevens criticized the Court for "erect[ing] an artificial distinction between 'normal delays' and the delays involved in obtaining a court declaration that the regulation constitutes a taking." 482 U.S. at 334 (Stevens, J., dissenting). Whether one agrees or disagrees with this criticism, the crucial point is that Justice Stevens recognized that *the Court* had erected a clear "distinction" between normal delays on the one hand and delays emanating from litigation on the other. Justice Stevens further argued that "[p]recisely the same" injuries to property owners would ensue from lengthy proceedings before a zoning board" (exemplary of "normal delays") and "litigation which ends with a judicial determination that the existing zoning restraint" constitutes a taking. *Id.* Again, whether or not one credits this argument, the argument plainly acknowledges that *the Court* did not see fit to include litigation within the contemplation of normal delays.

In general, argued Justice Stevens, "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *Id.* at 334-35. The court below held that Horwath's litigation challenging the validity of respondents' actions gave rise to "a delay attributable to the *normal* workings of governmental and legal processes." Pet. App. at A-11 (emphasis added). In adopting the precise reasoning of the *dissent* in *First English*, the court of appeal necessarily decided this case in a manner that conflicts with the Court's decision in *First English*.

Third, if the lower court's notion that takings plaintiffs cannot obtain compensation for time spent in litigation is inconsistent with the text of *First English*, it is also fundamentally at

odds with the entire concept of temporary takings endorsed by this Court. Under the decision below, a government agency in California may with impunity deprive property of all economically viable use or may harm property in a manner that does not substantially advance a legitimate state interest—with absolutely nothing to fear from the Just Compensation Clause. Like respondents, the agency that acts in a manner contrary to the Fifth Amendment can simply sit back and wait to be sued by the affected property owner, thereby forcing the owner to spend thousands of dollars and potentially many years invalidating those actions in court. Yet even after prevailing against the agency, the property owner would, under the decision below, receive *no compensation* for all the time during which the taking was in effect! Once the court rules in the owner's favor, the agency can simply rescind its original decision—without suffering any financial consequences for all the years it forced the property to remain economically idle or suffer under confiscatory rates. *Compare* Pet. App. at A-3 (litigation instituted on March 29, ***1990***), *with* Pet. App. at E-1 (litigation concluded in state courts on July, 8, ***1998***, more than eight years later).

If this "go and sin no more" approach adopted by the court below sounds suspiciously like the pre-*First English* approach that prevailed in California, it is. The California state court whose judgment was reversed in *First English* had held that "a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07. In like fashion, the court below ruled that Horwath could not recover damages for the time before it obtained a determination that respondents' actions constituted "unwarranted administrative delay" (and therefore constituted, as discussed in Part I above, a taking). Pet. App. at A-9. In *First English*, however, this Court explicitly "disagree[d]" with the lower court's holding, concluding that the Takings Clause "would require compensation for that period." 482 U.S. at 307. This Court emphasized that mere

invalidation of the government's action "without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id.* at 322. Yet mere invalidation is precisely what the decision under review "awards" to Horwath.

Finally, the ruling below stands in conflict with the venerable principle of takings law, reaffirmed in *First English*, that "the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The court of appeal conceded that the delay resulting from the Board's refusal to act on Horwath's petition for a rent adjustment was "unnecessary" and "unwarranted." Pet. App. at A-9. Despite these concessions, the court placed the burden of the delay entirely on Horwath, explicitly wishing to spare local government from having to incur "financial burden." Pet. App. at A-10.

This allocation of burdens is fundamentally in conflict with the bedrock principle of takings law stated in *Armstrong*. It may well be that, under *Williamson County*, property owners must bear the burdens of obtaining a final *administrative* decision. In all fairness and justice, however, it is the public who should bear the burden of regulatory misconduct that must be corrected through *litigation*. After all, it is the public who presumably benefits from the "delay that commonly occurs while government-imposed processes run their course." Pet. App. at A-9. It is no excuse that regulatory mistakes are somehow "inevitable" given "[t]he complexity of . . . rent regulation and real estate finance." Pet. App. at A-10 (quoting *Silverman v. Rent Leveling Board*, 649 A.2d 1342, 1348 (N.J. Super. Ct. App. Div. 1994)). Again, it is the public—not victimized property owners—who presumably benefits from these complex, delay-producing schemes; therefore, it is the public who ought to bear the burden when resulting delays injure private property. In our

system of constitutional government, agencies are supposed to be ultimately accountable to the public. If, by evading liability for just compensation, agencies are allowed to conceal the costs to property owners of agency violations of legal rights, the public is misinformed concerning the full costs and benefits of an agency's services.

For all these reasons, the lower court's ruling that a property owner may not recover temporary takings damages for the time required to invalidate a land-use regulation in court cannot be reconciled with this Court's decision in *First English*. If that ruling is allowed to stand, temporary takings doctrine, already a practical nullity in California, will be on its way to becoming a doctrinal nullity as well.

B. Denial of Compensation Where Property Retains Some Economically Viable Use

The court below also held that Horwath could not receive compensation for the unreasonable delay to which it was subjected because "the challenged delay did not deny Horwath all economically beneficial or productive use of its property." Pet. App. at A-11.[5] Thus, the court endorsed the conclusion of a

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[5] The basis for the court's conclusion that Horwath was not denied economically viable use of its property was as follows: "Horwath collected rents while it pursued its [legal] challenge, and it was free to sell, develop, or encumber its properties." *Id.* It is difficult to conceive how the ability to collect confiscatory rents—rents that "not only do not yield a fair return, but are insufficient to pay the operating cost of" providing rental housing, *Smith*, 270 U.S. at 590—is an economically viable use of rental property. Nor is the ability to sell or encumber property sufficient to establish an economically viable use. No doubt David Lucas was free to sell or encumber his beachfront lots, just as he could "picnic, swim, camp in a tent, or live on the property in a movable trailer." *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting). Even so, the Court agreed that Lucas had been deprived of all economically viable use of the lots. *See id.* at 1009. Finally, the court below offered no factual basis for the assertion that Horwath could "develop" its rental property into something else.

New Jersey appellate court that "in order to recover damages on an inverse condemnation claim, the municipal agency's decision and the administrative lag in according a remedy must have substantially destroyed the landlord's beneficial use of his property." *Silverman*, 649 A.2d at 1348, *quoted in* Pet. App. at A-10. For several reasons, the lower court's refusal to award compensation to temporary takings that do not result from a denial of all economically viable use of property cannot be reconciled with this Court's takings jurisprudence.

It is almost embarrassing to have to point out that while denial of all economically viable use of property is a *sufficient* condition for finding a compensable taking, it is not a *necessary* one. As *Lucas* reaffirmed, "the Fifth Amendment is [also] violated when land-use regulation 'does not substantially advance legitimate state interests.'" 505 U.S. at 1016 (quoting *Agins*, 447 U.S. at 260). Moreover, a land-use regulation can effect a taking even if fails neither the economically viable use prong nor the substantial advancement prong of the *Agins* test. As *Lucas* observed, even property owners who are not "able to claim the benefit of our categorical formulation" may still prevail under the multifactored analysis in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See Lucas*, 505 U.S. at 1019 n.8. Even the California Supreme Court, a court not known for its fidelity to the Takings Clause, has recently acknowledged (at least with respect to *permanent* takings) that a land-use regulation "may effect a taking though . . . it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property." *Kavanau v. Santa Monica Rent Control Board*, 66 Cal. Rptr. 672, 680 (1997), *cert. denied*, 118 S. Ct. 856 (1998).

Even if it acknowledged these precepts with respect to *permanent* takings, the court below appears to have fashioned a different rule with respect to *temporary* takings: compensation for such takings is available only if they result from denials of "all economically beneficial or productive use" of property.

Pet. App. at A-11. But that proposition manifestly conflicts with *First English*. Nothing in the *First English* opinion itself would justify limiting the just compensation mandate to only certain kinds of takings but not others. To start out with, the Court framed the question as "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings"—not just certain kinds of temporary regulatory takings. 482 U.S. at 313.[6]

Moreover, the rationale behind compensation for temporary takings is that mere "invalidation" of government action "without payment of fair value for the use of the property" is a "constitutionally insufficient remedy." *Id.* at 322. There is no logical reason why the remedy of invalidation ought to be insufficient for one kind of regulatory taking (the denial of all economically viable use) but sufficient for other kinds (such as the failure to substantially advance a legitimate state interest). Indeed, such a dichotomy would clash with the Court's unequivocal statement that, "in the event of a taking, the compensation remedy is required by the Constitution." *Id.* at 316. Thus, if a failure to substantially advance a legitimate state interest is a taking—and, of course, it is—then a compensation remedy is "required," regardless of whether the affected property was or was not deprived of all economically viable use.

In ruling to the contrary, and in ruling that compensation is not required for the time a property owner has spent in successful litigation, the lower court decided an important question of takings law in a way that conflicts with *First English* and other relevant decisions of this Court. Review of that decision is therefore warranted under this Court's Rule 10(c).

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[6] The *First English* opinion does on occasion employ the term "all use," as in regulations that "deny a landowner all use of his land" or as in a "taking of all use of property." *Id.* at 318, 321. But the reason for that narrow language was, as the Court explained, simply that "the allegation of the complaint . . . was that the ordinance in question denied [the owner] all use of its property." *Id.* at 321.

III

THE INTERPRETATION OF *FIRST ENGLISH* ADOPTED BY THE DECISION BELOW ALSO CONFLICTS WITH DECISIONS OF OTHER FEDERAL AND STATE COURTS

Although the California Court of Appeal's interpretation of *First English* is consistent with the decisions of some state courts of last resort, *see, e.g., Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993), *cited in* Pet. App. at A-9, that interpretation is in conflict with the decisions of at least one United States court of appeals and two other state courts of last resort.

A. Other Federal and State Courts Acknowledge That Compensation Is Available for the Time Required to Invalidate Confiscatory Land-Use Regulations Through Litigation

1. The Federal Circuit

Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990), stemmed from a dispute between a mining company and the federal government over rights to mine a certain tract of land in California. Although the company had acquired the mineral rights in 1905 and had in fact mined the property for many years, the government asserted in a letter dated April 9, 1976, that the tract was "owned outright in fee by the United States . . . with no reservations in the title. Dredging activity or removal of any material, including precious metals is prohibited." *Id.* at 1579. The effect of this letter was "to prevent Yuba from mining materials for about six years." *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 890 (Fed. Cir. 1983) (earlier incarnation of same case). The approximately six-year period ended on January 29, 1982, the date the government withdrew the 1976 letter. Crucially, the letter was withdrawn because the Yuba successfully confirmed its title to the minerals in quiet title *litigation* against the government. *See id.* at 886.

On these facts, the Federal Circuit concluded that "the mineral rights in the [property] had been temporarily taken by the government from the time of the [government's] April 9, 1976 letter to Yuba until the government withdrew the letter on January 29, 1982." *Yuba Natural Resources*, 904 F.2d at 1580. This nearly six-year period included more than 18 months of time during which Yuba was establishing, through litigation, the invalidity of the government's claim to the mineral rights. *See Yuba Goldfields*, 723 F.2d at 886 (recounting the filing of Yuba's suit on January 12, 1980, and the government's abandonment on January 4, 1982, of its appeal from an adverse trial court decision in that suit). The Federal Circuit held that the measure of just compensation due to Yuba was "the fair rental value of the property for the period of the taking," *Yuba Natural Resources*, 904 F.2d at 1581, which necessarily included *the period encompassed by the litigation*. The Federal Circuit therefore affirmed the Claims Court's award of compensation to Yuba for a temporary taking. *See id.* at 1583.

Contrast the Federal Circuit's decision to the decision below. The California Court of Appeal would no doubt have lectured Yuba as to why the six-year delay in its being able to exploit mineral resources "is the same kind of delay that commonly occurs while government-imposed processes run their course." Pet. App. at A-9. While the Federal Circuit affirmed an award that included compensation for the period of time spent challenging the validity of government action, the court below vacated a similar award, dismissing that time period as "a [noncompensable] delay attributable to the normal workings of governmental and legal processes." Pet. App. at A-11. In so doing, the court below entered a decision in conflict with the Federal Circuit's decision in *Yuba Natural Resources*.

2. The Nebraska Supreme Court

In *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994) (*Whitehead Oil II*), the company applied for a permit to build and operate a service station and convenience

store on its property consistent with the existing zoning. The city modified the zoning designation of the property and denied the application as inconsistent with that designation. *See id.* at 678. That was in June of 1987. Nearly seven years later, after two trips through the Nebraska court system, the company succeeded in having the zoning change declared invalid under state law: the Nebraska Supreme Court concluded that "the city acted arbitrarily and capriciously in changing the zoning designation of the [company's] parcel"; the court "direct[ed] the district court to remand the matter to the city, ordering it to issue Whitehead Oil the permit it seeks." *Id.* at 678, 680.

Having ruled for the oil company on this state-law zoning issue, the Nebraska Supreme Court then considered the company's additional claims for "damages in inverse condemnation under both the U.S. and Nebraska Constitutions." *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 401, 405 (Neb. 1994) (*Whitehead Oil III*) (companion case decided the same day as *Whitehead Oil II*). Those takings claims sought compensation in an amount equal to "the fair rental value of its property as a site for a convenience store . . . *from the date its use permit should been have issued*"—not the date on which the city's actions were voided. *Id.* (emphasis added).

How would the court below have treated these claims? The answer is not difficult. The California Court of Appeal would have held that "the delay to which [the company] was subjected [in obtaining its permit] is the same kind of delay that commonly occurs while government-imposed processes run their course." Pet. App. at A-9. Under the decision below, the seven years the company spent litigating the permit denial was a noncompensable "delay attributable to the normal workings of governmental and legal processes." Pet. App. at A-11.

But how instead did the Nebraska Supreme Court actually treat the company's takings claims? As opposed to a reading of *First English* that focused on what that decision supposedly "declined to address," Pet. App. at A-11, the Nebraska Supreme

Court took *First English* at face value: "a landowner may sue for damages when property is 'taken' by government regulation, even if the taking is only temporary *and the regulation later invalidated*." *Whitehead Oil III*, 515 N.W.2d at 407 (emphasis added). Having concluded that the city's actions failed to substantially advance a legitimate state interest, the court awarded damages to the company for a temporary taking. *See id.* at 408. The critical point for present purposes is that these damages accrued from "the date of the city's refusal to permit [the requested] use of the land" to "the date the city issues the permit Whitehead Oil seeks," most of which time the company was embroiled in litigation against the city. *Id.* at 412. In the Nebraska courts, therefore, a landowner ***can*** "recover damages for the time before it is finally determined that [the land-use] regulation constitutes a 'taking' of his property." *First English*, 482 U.S. at 306-07. In so holding, *Whitehead Oil* cannot be reconciled with the decision below.

3. The Idaho Supreme Court

Also in conflict with the decision below is the decision of the Idaho Supreme Court in *McCuskey v. Canyon County Commissioners*, 912 P.2d 100 (Idaho 1996) (*McCuskey II*). In that case, a property owner sought to construct a convenience store, a use authorized by the zoning in existence when he purchased the property. In 1986, the county initially granted a building permit but quickly revoked it on the ground that the convenience store was inconsistent with a 1979 zoning ordinance that purported to downzone the property from "heavy industrial" to "rural residential." *See id.* at 101-02. The property owner challenged the county's action in a declaratory judgment action; more than six years later, the Idaho Supreme Court declared the 1979 ordinance void under state law. *McCuskey v. Canyon County*, 851 P.2d 953, 959 (Idaho 1993) (*McCuskey I*). The owner then sought "compensation for the County's interference with his use of the property, which he contends constituted a taking, during the period following [revocation of the building

permit] and until the date the opinion in *McCuskey I* was filed." *McCuskey II*, 912 P.2d at 103. In other words, the property owner sought damages for a temporary taking pursuant to *First English*. The trial court denied relief on the ground that the takings claim was barred by the statute of limitations. *See id.* On appeal, the critical question was when did the takings claim first accrue.

Under the decision below, this would be an easy question. Because the time spent obtaining the judicial decision that invalidated the 1979 zoning ordinance constituted the "kind of delay that commonly occurs while government-imposed processes run their course," no taking could have occurred while the validity of the county's actions was being litigated. Pet. App. at A-9. Under such an analysis, the takings claim could have accrued no earlier than the date of the *McCuskey I* decision in 1993. The Idaho Supreme Court, however, provided an irreconcilably different answer:

> The time of taking occurs . . . as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, [the property owner] was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, *the date that [he] was notified . . . that he could not build the convenience store.*

McCuskey II, 912 P.2d at 104 (citations omitted and emphasis added).

In the present case, the "full extent of the plaintiff's loss of use and enjoyment of the property" became apparent no later than February 22, 1990, the date that the Board began refusing to grant the necessary rent adjustment certificates despite the fact that Horwath was entitled to those certificates as a matter of law under Regulation 1241. *See* Pet. App. at A-2. Yet, in contrast to the Idaho Supreme Court in *McCuskey II*, the court

below ruled that a taking did not occur—and could not have occurred—at that time. This conflict, in conjunction with the above-discussed conflicts between the decision below and the decisions of the Federal Circuit and of the Nebraska Supreme Court, demonstrates that the present case warrants review pursuant to this Court's Rule 10(b).[7]

B. The Nebraska Supreme Court Acknowledges That Compensation Is Available for Temporary Takings Even Where Property Retains Some Economically Viable Use

In addition to the conflicts set out above, the decision below also creates a conflict with respect to the availability of compensation for temporary takings that do not result from denials of all economically viable use of property. The conflict is not subtle: While the decision below held that respondents' actions could not give rise to a temporary taking because they "did not deny Horwath all economically beneficial or productive use of its property," Pet. App. A-11, the Nebraska Supreme Court held precisely the opposite in *Whitehead Oil*, specifically *rejecting* the government's argument that "under the U.S. Constitution, compensation for a temporary taking can only be had when all economically viable uses have been foreclosed," 515 N.W.2d at 407.

In resolving the company's claim for a temporary taking, the court in *Whitehead Oil* asked the straightforward question whether the city's denial of a use permit satisfied this Court's familiar two-pronged test for a categorical taking: "[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 408 (alterations in original). Emphasizing an obvious point that seems to escape

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[7] Although the decision below did not strictly emanate from "a state court of last resort," Rule 10(b), it mirrors the recent decision of the California Supreme Court in *Landgate v. California Coastal Commission*, as explained at *supra* note 2 and accompanying text.

the California courts—that the foregoing is "a disjunctive test under which a taking results if either element is not met"—the Nebraska Supreme Court concluded that the city's action failed the *first* prong of the test (the prong implicated in the present case), in that "the city acted not in furtherance of a legitimate state interest." *Id.* Observing that this Court "has long recognized that a land-use regulation or zoning ordinance which is an invalid exercise of police power may result in a taking, *although not all economically viable use of the land is denied*," the state court awarded damages to the company for a temporary taking. *Id.* (emphasis added). Thus, in contrast to the court below, the Nebraska court did not treat the denial of economically viable use as prerequisite to compensation under *First English*. *See id.* In this respect, *Whitehead Oil* stands in irreconcilable conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition is granted in No. 98-183, *Landgate v. California Coastal Commission*, the present petition should be held pending the disposition of that case.

DATED: October, 1998.

Respectfully submitted,

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Appendix A-1

Filed 4/30/96

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

HORWATH ASSOCIATES,

Plaintiff and Appellant,

v.

THE CITY OF EAST PALO ALTO et al,

Defendants and Respondents.

A067695

(San Mateo County Super. Ct. No. 3766167

Horwath Associates (Horwath), property owners in the City of East Palo Alto, brought this action against the City and its Rent Stabilization Board.[1] Horwath sought an award of damages for inverse condemnation on the theory that the City's delay in granting a rent increase on its 124 rent-controlled units constituted an uncompensated taking of property in violation of the California and United States Constitutions. (U.S. Const., Amend. V; Cal. Const., art I, § 19.) The trial court held that a temporary taking had occurred and awarded Horwath $28,032

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[1] The City of East Palo Alto (the City) was incorporated in 1983 and is a municipal corporation organized and existing pursuant to the laws of the State of California (Gov. Code, § 34302 et seq.). The East Palo Alto Rent Stabilization Board (the Board) is an agency of the City and is charged with the duty and responsibility of administering the City's Rent Stabilization Ordinance. Where appropriate, we will refer to the City and its Board collectively as "the City."

in damages and its attorney fees. Both parties appeal. Horwath appeals contending the court erred in determining the amount of compensation owed. The City cross-appeals contending, among other things, that the court erred in finding an unconstitutional taking of Horwath's property. We conclude the City's actions did not result in a taking of property for which Horwath is entitled to compensation under the state or federal constitutions. Consequently, we reverse.

Facts

Horwath, the plaintiff in this case, is a family general partnership which purchased several apartment complexes with a total of 124 rental units in an unincorporated area of San Mateo County in 1982 and 1983. After the City was incorporated in 1983, a "Rent Stabilization and Eviction for Good Cause Ordinance" was adopted and the Board was formed.

During the course of Horwath's ownership, the rents which it received were insufficient to meet the expense of owning the buildings, and Horwath began defaulting on its loan obligations. In 1989, Horwath filed petitions with the Board seeking permission to increase the rents at its apartment complexes. After hearings were held over a two-day period, the hearing examiner issued a decision denying Horwath's petitions for a rent increase.

Horwath immediately appealed the hearing examiner's decision to the full Board. However, the Board failed to take any action on Horwath's appeal within the timeframe provided by Rent Board Regulation 1241 (Reg. 1241). Regulation 1241 states: "If the board fails to render a final decision on a landlord's petition for a rent adjustment within 110 days from the date of filing, the petition *shall be deemed granted in the amounts requested on the petition on the 111th day following the date of the filing of the petition.*" (Emphasis added.) Despite this language, the Board did not make any decision, and it did not respond to Horwath's request to issue

rent certificates authorizing rent increases as required by Regulation 1241.

On March 29, 1990, Horwath filed a petition for writ of administrative mandamus in the San Mateo County Superior Court seeking an order that rents be set for its 124 units as requested in its petitions. The Board filed an answer to the petition admitting that it did not render its final decision within the mandatory time limits set forth in Regulation 1241, but denying that is was required to do so because Regulation 1241 was constitutionally invalid, void, and unenforceable.

After considering the record, Judge Clarence Knight issued a writ of mandate finding that the requirements of Regulation 1241 were mandatory, and that the City and its Board had failed to comply with its terms. The court rejected the Board's constitutional challenge, finding that Regulation 1241 was reasonable, valid and "consistent with the interests of landlords, tenants, and the general public in having petitions for rent increases expeditiously decided." The Board was ordered to "promptly issue new rent certificates" at the level requested in Horwath's petitions. The clerk issued the writ of mandate on June 27, 1990.

Pursuant to the writ, Horwath was allowed to increase its rents by a total of $27,828 per month. The new rent certificates for each of the 124 apartments were mailed to Horwath on July 31, 1990. After giving 30-days' notice on any rent increase as required by law (Civ. Code, § 827), Horwath raised rents on some of the units but eventually lost the properties to the primary lender because of recurring defaults.

Horwath then sued the City in inverse condemnation. Horwath argued that "because the defendants failed to properly administer the rent control ordinance and delayed awarding plaintiff rent increases to which it was entitled, defendants are liable to plaintiffs in inverse condemnation." Horwath further alleged that "had it received the increased rents when it applied

for them in August, 1989 and thereafter, it could have met its debt service and maintained its ownership of the properties."

It is important to emphasize that Horwath's lawsuit did *not* challenge the constitutionality of the City's rent control scheme. Rather, the lawsuit focused on the Board's failure to timely grant the requested rent increases, and its failure to abide by the time requirements imposed by Regulation 1241. Horwath sought damages to recoup its $600,000 down payment, its loss of equity between $1 million and $3.5 million and the loss of sums contributed by Horwath's individual partners to keep the properties afloat (approximately $800,000).

A two-week trial of the matter took place before the court and included testimony by Horwath's general managing partners, expert witnesses for each side, and numerous other witnesses. We need not recount at length the trial court's extensive findings. One of the key findings was that Horwath could not prevail on its permanent taking claim. The court found that irrespective of the City's delay in authorizing Horwath to increase its rents, "[t]he ultimate loss of the property seems to have been inevitable as a result of a large number of factors," including "the incorporation of the City of East Palo Alto, the adoption of the rent control ordinance by the City, certain increases and then rollbacks in allowed rentals, the recession in the economy, the political turmoil in East Palo Alto, the breakdown of public safety in East Palo Alto, the inability of Plaintiff to consistently obtain close to 100% occupancy, the crime, violence and degradation of property values in the area, the savings and loan problems of the times, and numerous other socio-economic problems of the era and of the area." Accordingly, the court ruled that "[n]o permanent damages can be awarded. To do so would be to engage in pure speculation."

However, the court went on to find that the failure of the Board to comply with its own Regulation 1241 caused a temporary taking of Horwath's property and that even a temporary

taking required just compensation. The court found this temporary taking spanned the course of approximately six months—from April 1, 1990, the date Horwath would have been able to actually start charging increased rents if the Board had timely acted on Horwath's petitions for a rent increase by February 22, 1990, up to and including October 1, 1990, the date Horwath actually was able to raise its rents after the Board mailed the new rent certificates on July 31, 1990.[2] The court found this "six month delay in obtaining the maximum rental allowances" caused a monthly loss of $4,672, totaling $28,032, together with interest, for which Horwath was entitled to be compensated. The court also awarded Horwath $22,008 in attorney fees. (Code Civ. Proc., § 1036 [prevailing plaintiff in inverse condemnation action may recover attorney fees].)

Discussion

The California and United States Constitutions forbid the taking of private property without just compensation. (U.S. Const., Amend. V; Cal. Const., art. I, § 19.)[3] Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." (*United States v. Clarke* (1980) 445 U.S. 253, 257.) The determination of whether an inverse taking has occurred is

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[2] It is obvious the court computed the 30-days notice requirement contained in Civil Code section 827 in calculating the delay for which the City was responsible.

[3] The Fifth Amendment applies to the states through the Fourteenth Amendment. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 310, n. 4.) Neither party argues that this court should apply two different principles or standards under the "takings" clauses of the two Constitutions, and our Supreme Court has recognized that in analyzing "an inverse condemnation action arising out of a regulatory taking" the standards imposed by the state and federal constitutions are virtually identical. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9, fn. 4.)

a question for the court, even when there are factual questions involved. (*Redevelopment Agency v. Tobriner* (1984) 153 Cal. App.3d 367, 376; *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 Cal.App.3d 863, 868.)

The trial court seemed to believe that simply because the Board failed to act on Horwath's request for a rent increase within the time limit imposed by a municipal regulation, that a compensable temporary taking of property occurred until the Board's inaction was successfully challenged in court and the higher rents were put into place. The situation presented by this case is not that simplistic. Our Supreme Court has recently reminded us that California's "just compensation" provision "never was intended, and never has been interpreted, to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property." (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 378.)

The taking alleged herein does not fall into either category of governmental action which generally requires compensation —a governmental activity that authorizes or directs a physical intrusion into the plaintiffs' property or which deprive the landowner of all economically feasible use of the property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015; see also *Hensler v. City of Glendale*, *supra*, 8 Cal. 4th at p.10; but see *Customer Co. v. City of Sacramento*, *supra*, 10 Cal.4th at p. 371 [property destruction caused by police in pursuit of suspect did not constitute a taking].) Where, as here, the claim is that governmental conduct not amounting to a permanent physical occupation or confiscation of property involves a regulatory taking, the analysis is peculiarly fact dependent, involving "essentially ad hoc, factual inquiries." (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124; *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at p. 1015; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211, 224.)

"[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. [Citation.] An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking. [Citation.]" (*Hensler v. City of Glendale*, *supra*, 8 Cal.4th at p. 10, internal quotation marks omitted.) We read the Supreme Court as requiring us to balance the legitimacy of the state's interest against the impact on the owner's use of his land. (See, e.g., *Agins v. Tiburon* (1980) 447 U.S. 255, 260-261.)

In *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, our Supreme Court set the stage for Horwath's action when it recognized that a public agency's unreasonable delay in granting a rent increase could give rise to a takings claim. After pointing out that "property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them," the court noted that "[s]ome delay is, of course, inherent in all rent control procedures. However, only those delays which are longer than practically necessary to achieve the legitimate purposes of the legislation are constitutionally proscribed." (*Id.* at pp. 191-192, internal quotation marks omitted, quoting in part *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169, see also *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 687.) However, in order to rise to the level necessary to state a claim for inverse condemnation, the delays must be long, continued, unreasonable and substantially greater than what is practically necessary. (*Smith v. Ill. Bell Tel. Co.* (1926) 270 U.S. 587, 591; *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d at p. 193; *Oceanside*

Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887, 901.)

Our case involves a local rent control regulation that sets forth a specific procedure by which a person may seek to modify or ameliorate the rent control ordinance's effect on him by seeking a rent increase. Its provisions require that complaints of aggrieved property owners be addressed, and that action—favorable or unfavorable—be completed within 110 days. Thus, there are protections built into the regulation to protect the applicant from unreasonable delay on the part of the Board. (See *Fisher v. City of Berkeley, supra,* 37 Cal.3d at p. 691 [120-day limit on landlord petitions not excessive]; *Carson Mobilehome Park Owners' Assn. v. City of Carson, supra,* 35 Cal.3d at p. 193 [105-day period for rent board to act not excessive]; *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, supra,* 157 Cal.App.3d at p. 901 [110-day period for action on rent increase not excessive]; *Baker v. City of Santa Monica* (1986) 181 Cal.App.3d 972, 986 [120-day period not excessive].)

If the Board fails to act within the prescribed time, the writ of administrative mandate provides an adversely affected citizen with an effective means of forcing a recalcitrant Board to act on an overdue submission. Horwath, of course, ultimately received the requested rent increase as a result of utilizing this writ procedure. What Horwath alleges, and the trial court found, was a temporary taking of its property occurred during a six-month period in which four things happened: 1) the superior court decided the constitutionality of the regulation in question and issued the writ of mandate; 2) the Board issued 124 certificates authorizing the requested rent increases; 3) Horwath gave the affected tenants 30-days notice as legally required, and 4) the rent increases actually went into effect. Given the complexities of rent control, of which we are intimately familiar (see *City of Berkeley v. City of Berkeley Rent*

Stabilization Bd. (1994) 27 Cal.App.4th 951), this period is not unreasonably long.

Of course, while Horwath was presenting a judicial challenge to the Board's inaction, it was not able to make immediate optimum use of its property by charging higher rents. However, this fact alone does not constitute a taking. Instead "[m]ere fluctuations in value during the process of government decisionmaking, absent extraordinary delay, are 'incidents of ownership' . . . [which] cannot be considered a 'taking' in the constitutional sense." (*Agins v. Tiburon, supra,* 447 U.S. at p. 263, fn. 9, citing *Danforth v. United States* (1939) 308 U.S. 271, 285.)

In considerable measure, the delay to which Horwath was subjected is the same kind of delay that commonly occurs while government-imposed processes run their course, which have not traditionally been viewed as constituting a compensable taking. (See e.g. *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, 870 [delay which occurred while city studied the possible acquisition of plaintiff's property as open space did not constitute temporary taking]; *Steinbergh v. City of Cambridge* (Mass. 1992) 604 N.E.2d 1269, 1275 [delay occasioned by litigation process in invalidating rent control restriction did not constitute temporary taking]; see generally *Mira Development Corp. v. City of San Diego* (1988) 205 Cal. App.3d 1201, 1220 [government may engage in good faith decisionmaking concerning public use of site without being subject to inverse condemnation action].)

While no California case has addressed the precise question here—whether a taking is wrought by unnecessary administrative delay in authorizing a rent increase—this very question was addressed in a case discovered by out independent research, *Silverman v. Rent Leveling Bd.* (N.J.Super.A.D. 1994) 649 A.2d 1342. As in our case, a property owner sought compensation for unwarranted administrative delay in approving his application for hardship rent increase, which was ultimately

achieved through judicial intervention, claiming the delay constituted an unconstitutional temporary taking of rental premises without just compensation.

The court observed, [w]hile we do not endorse the desultory pace at which plaintiffs' application was reviewed by the municipal agencies, we reject the claim that there was a taking without just compensation." (*Id.* at p. 1348.) The court went on to explain, "[T]he complexity of the subject [rent regulation and real estate finance] indicates that mistakes are inevitable and that public entities, and ultimately their taxpayers, cannot always be called to account when errors are made. Considering these circumstances, we conclude that in order to recover damages on an inverse condemnation claim, the municipal agency's decision and the administrative lag in according a remedy must have substantially destroyed the landlord's beneficial use of his property." (*Ibid.*)

We are persuaded that the approach taken in *Silverman* is the proper one, as it appears to provide for the most equitable accommodation of the competing public and private interests at stake in a "takings" challenge such as this one. If persons are permitted to be monetarily compensated with the "unusually generous" remedies available in inverse condemnation actions every time a local governmental agency delays in making a particular decision, the financial burden on local governments will become overwhelming and scarce public resources will be dissipated at an alarming rate. (*Customer Co. v. City of Sacramento, supra,* 10 Cal.4th at p. 390; see *Air Quality Products, Inc. v. State of California* (1979) 96 Cal.App.3d 340 352.) These funds are better put to public use, especially where, as here, the harm experienced by the property owner is temporary and the essential attributes of property ownership remain intact while relief is being sought.

In finding a temporary taking had occurred, the trial court cited *First Lutheran Church v. Los Angeles County, supra,* 482 U.S. 304. In that case, the county passed an ordinance

which prohibited the church from building on its property which was ultimately invalidated after a successful legal challenge. The Supreme Court held that the church was entitled to bring an action in inverse condemnation for the time it was subject to the invalid ordinance because "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (*Id.* at p. 318.)

In *First Lutheran*, the Supreme Court was addressing an ordinance which denied the landowner all use of its property, and it expressly did not "deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ." (*Id.* at p. 321.) Our case involves a delay attributable to the normal workings of governmental and legal processes, a situation *First Lutheran* expressly declined to address. Furthermore, in our case the challenged delay did not deny Horwath all economically beneficial or productive use of its property. Horwath collected rents while it pursued its challenge, and it was free to sell, develop, or encumber its properties. We agree with the observation in *Guinnane v. City and County of San Francisco, supra,* 197 Cal.App.3d at page 869, that "there is nothing in *First* [*Lutheran*] which alters the established principle that the interim burden imposed on a landowner during the government's decisionmaking process, absent unreasonable delay, does not constitute a taking."[4]

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[4] We also have considered a case decided by the Second District after this matter was fully briefed, *Santa Monica Beach, Ltd. v. Superior Court* (1996) 42 Cal.App.4th 1228. In that case, the lower court granted a demurrer to a landlord's inverse condemnation claim against a local rent control board for a regulatory taking. The landlord's regulatory taking claim questioned how effectively the rent control's stated purpose—mitigating a housing shortage for the poor—was furthered by the rent control scheme. Since the legitimate state interest of maintaining an affordable housing stock was

(continued...)

Having concluded that Horwath did not establish that the City's delay in authorizing the rent increase effected a taking of his property in violation of the state and federal constitution, we find it unnecessary to discuss whether the court's remedy provided it adequate compensation.

The judgment is reversed. Each party is to bear its own costs.

King, J.

We concur:

Peterson, P.J.

Haning, J.

[4] (...continued)
allegedly not being advanced by the rent control scheme, the landlord claimed he was being deprived of the economically viable use of his land without advancing the law's stated purpose. The appellate court overturned the grant of demurrer, concluding this type of takings claim could not properly be evaluated without a factual record. In view of the obvious differences between the takings claim in *Santa Monica Beach, Ltd.* and the takings claim we review in the instant case, we do not believe *Santa Monica Beach, Ltd.* provides any illumination on the issues at hand.

Appendix B-1

Filed 6/13/94

SUPERIOR COURT STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JOSEPH HORWATH, and
ANTHONY HORWATH,
dba HORWATH ASSOCIATES

No. 376167

Plaintiffs,

DECISION

vs.

THE CITY OF EAST PALO ALTO;
THE EAST PALO ALTO RENT
STABILIZATION BOARD,

Defendants.

_____/

This is an action for inverse condemnation which proceeded to trial pursuant to a First Amended Complaint filed June 28, 1993. The gravamen of the single cause of action is that contrary to the requirements of the Defendants' Rent Control Ordinance and Regulations promulgated pursuant thereto, the City and its Rent Control Board failed to grant apartment rent increases to Plaintiffs by February 22, 1990, a mandatory date pursuant to petitions for increases filed by Plaintiffs in August and September of 1989; that Plaintiffs were required to petition for a writ mandate to have the Certificates of Maximum Legal Rents issued; that the writ was granted June 27, 1990, but no certificates were in fact issued until the Fall of 1990; that as a result of the 6 to 8 month delay occasioned in Plaintiffs receiving the certificates, Plaintiffs 124 units of apartments were lost through foreclosure, Plaintiffs being unable to service the Notes and Deeds of Trust encumbering same without the requested increased rents. Plaintiffs prayed for compensatory damages for the alleged

unconstitutional taking of its property, interest, attorney's fees, appraisal fees, other-costs and expenses and for costs of suit.

Defendants filed a general denial to the unverified complaint, raised 8 affirmative defenses thereto and at the commencement of trial abandoned the second (Statute of Limitation), third (Governmental Immunity), fourth (Laches), and seventh (Non-Exhaustion of Administrative Remedies). This left viable for trial the first (Failure to State a Cause of Action) fifth (Valid Exercise of Police Powers), sixth (Estoppel), and eighth (Failure to Mitigate Damages) affirmative defenses. Defendants in their Answer prayed that Judgement be entered in Defendants' favor, for reasonable attorney's fees and costs of suit. At trial, the question of Failure to Mitigate Damages was in great measure transmuted into an affirmative defense that any losses suffered by Plaintiffs either were solely caused by the activities of the Plaintiffs or were caused by economic and social factors beyond the control of either the Plaintiffs or the Defendants.

The Court was thus presented with issues of liability, causation and damages at trial.

ISSUE: LIABILITY

Prior to 'the commencement of the instant action, Plaintiffs had filed a Petition for Writ of Mandate in San Mateo County Superior Court Action No. 349812 on March 29, 1990, seeking a Writ to Compel the City and its Rental Control Board to certify Plaintiffs' rents at the levels requested in their Petitions as mandated by the Cities' own ordinance and regulations, for an award of attorney's fees pursuant to Government Code §800 and CCP §1021.5, plus Petitioners' costs of Court. Petitioners in that action essentially alleged that the East Palo Alto "Rent Stabilization and Eviction for Good Cause Ordinance", particularly Section 12.A.12 thereof and Regulations 31241 and 1243 adopted pursuant thereto, were constitutionally valid and enforceable; that the ordinance and the regulations

mandated that the City render a final decision on a landlord's petition within 110 to 120 days following the date of filing; that a failure to do so required the City to certify the Petitioners' rents in the amounts requested in their petition (Regulation 1241); that 197 days had elapsed since the date of filing the petitions and the City had failed to render a final decision on the applications; that the City should accordingly be ordered to forthwith comply with its own ordinance and regulations and issue the certificates of rent increases as requested.

Interestingly, the City and its Board replied to the petition by admitting that the Board did not render its final decision within 110 days of filing as required by Regulation 1241; but then denied that it was required to do so because that regulation was itself constitutionally invalid, void and unenforceable, but the City had not yet repealed same (nor did it apparently have any plans to do so)!!

The Writ of Mandate proceeded to hearing on May 4, 1990 before the Hon. Clarence B. Knight, Judge, Department 2 of this Court. The Minute Order (of the hearing before Judge Knight reflects that he specifically found Regulation 1241 to be reasonable, valid and constitutional. He granted the Petition for Writ of Mandate with costs to Petitioners, denying Petitioners request for attorney's fees.

On May 7, 1990, Judge Knight further entered a tentative written Decision setting out the same ruling and on June 27, 1990 a written Judgment granting peremptory Writ of Mandate was filed ordering the City and its Board ("to . . . promptly issue new rent certificates certifying Petitioners' rents at the equalized levels requested in their petitions and set forth in the requested rent schedule (3 pages), a copy of which is attached to this Judgment; . . .") and allowing Petitioners their costs and disbursements (it was silent as to the issue of attorney's fees).

Judge Knight found that the requirements of Regulation 1241 were mandatory, that the City and its Board had failed to

comply with the terms of their own regulation, and thus liability was established at least insofar as Regulation 1241 is concerned (failure to render a final decision within 110 days from the date of filing mandates that the Petition "shall be deemed granted in the amounts requested in the Petition on the 111th day following the date of filing the Petition.").

The Judgment of and writ issued pursuant thereto left open for further determination at the trial of this matter the questions of constitutional validity and enforceability of Section 12-A-12 of the Rent Control Ordinance and Regulation 1243 and any liability of the City and its Board for any admitted failure of the Defendants to comply with the ordinance and regulation.

Section 12.A.12 of the Ordinance provides that:

> "The rules and regulations adopted by the Board *shall* provide for *final* Board action on any individual petition within one hundred twenty (120) days following the date of filing of the individual rent ceiling adjustment petition, unless the conduct of the Petitioner or other good cause is responsible for the delay." (Emphasis added.)

Regulation 1243 provides:

> "TIME FOR DECISION.
>
> The Board *shall* take *final* action on any individual adjustment petition within one hundred twenty days following the date of proper filing, unless the conduct of the Petitioner or other good cause is responsible for the delay. Good cause may include, but is not limited to, continuances granted, the submission of additional information by the Petitioner, the filing of a Motion for Reconsideration, or a request by Petitioner to

disqualify the hearing examiner or Board member(s)." (Emphases added.)

This court now specifically finds Section 12.A.12 of the Ordinance and Regulation 1243 to provide for reasonable time limits within which the City/Board must dispose of a rent increase application pursuant to the rules laid down in *Birkenfeld v. City of Berkeley* (1976) 17 CAA 129, 169, *Carson Mobile Park, etc., v. City of Carson* (1983) 35 CA3 187, and *Oceanside Mobile Park, etc., v. City of Oceanside* (1984) 157 CA3 887. Both Section 12.A.12 and Regulation 1243 are constitutional and valid. Defendants admit non-compliance with both thereof as well as Regulation 1241. The City and its Board further acknowledge that neither at the time nor in this trial has any good cause been shown pursuant to either the Ordinance or the Regulation for any delay beyond the mandatory time limits, nor that any delay was caused by any conduct of Plaintiffs/Petitioners.

Liability of the Defendants has therefore been clearly established.

ISSUE: CAUSATION

An interesting aspect of this case is that the Plaintiffs' alleged loss is economic rather than physical. Most cases pertaining to inverse condemnation deal with such things as landslides, collapsing sewers, activity on easements, and other physical situations. Here, the "taking" is alleged to be economic only in the sense of the contended loss of Plaintiffs, equity in 124 units of apartments because of the failure of the City/Board to act on rent increase applications within the 110/120 days maximums permitted by the Rent Control Ordinance and Regulations of the City of East Palo Alto.

Whether the "taking" be physical or economic, some authorized activity by the City/Board dealing with the public good has to have caused the loss or losses complained of by the Plaintiff if the Plaintiff is to prevail herein.

Amendment V to the United States Constitution provides that "no person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." Article I, Section 19 of the California Constitution sets out that "private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."

While the "taking" for which a public entity may be held liable is generally a physical invasion or interference with property rights, it can occur when the body politic deprives the owner of the economically viable use of his property. (*Keystone Bituminous Association v. The Debenedictis* (19137) 480 U.S. 470; *Agins v. Tiburon* (1980) 447 U.S. 255. The adoption and enforcement of valid ordinances and regulations which substantially advance a legitimate governmental interest and which result in the loss of all economically viable use of property, can constitute a "taking". (*First English Evangelical Lutheran Church v. Los Angeles* (1987) 482 U.S. 304; *Gregory v. San Juan Capistrano* (1983) 142 Cal.App.3d 72; *Fisher v. City of Berkeley* (1984) 37 CA3d 644).

Section 3 of the East Palo Alto Rent Stabilization Ordinance states that the purpose of the ordinance is:

> "To protect residential tenants in the City from unreasonable rent increases by discouraging speculation in rental property and stabilizing rent increases; to protect the tenants from arbitrary, discriminatory or retaliatory evictions; and at the same time to assure landlords both a fair return and rental income sufficient to cover costs of maintenance and operating expenses as well as the costs of capital improvements to their rental properties."

The adoption of the ordinance and regulations promulgated pursuant thereto clearly establishes a public

use/purpose; and, if the effectuation thereof results in the lack of economic viability of the property such as to cause its loss through foreclosure, a compensable "taking" may well result.

The key word in the foregoing is "cause". While inverse condemnation is not necessarily a negligence type action, the Plaintiff must demonstrate a causal relationship between the governmental activity and the property loss complained of in order to establish an actionable "taking". (*Souza v. Over-development Co.* (1985) 164 CA3d 165).

> "Typically, this element is referred to as 'proximate cause'. Unlike the corresponding element in negligence cases, however, foreseeability is not a consideration for inverse condemnation. Instead, a governmental entity may be held strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of the Plaintiff's damages even it only one of several concurrent causes. (*Belair v. Riverside County Flood Dist.* (1988) 47 CA3d 550, 558-559 [253 Cal.Rptr. 693, 764 p.2nd 1070].)"
>
> *Marshall v. Department of Water and Power* (1990) 219 CA3d 1124, 1139.

Prior to 1991 BAJI 3.75 defined proximate cause as that which produced the loss and without which the loss would not have occurred. BAJI 3.76 on the other hand defined legal cause as a cause which is a substantial factor in bringing about the loss. The case of *Mitchell v. Gonzales* (1991) 54 CA3d 1041 abolished the proximate cause test and established only the substantial factor test as being appropriate to the determination of cause of loss. The ruling of *Marshall*, supra, 1139, seems to be in accord with BAJI 3.76 when it states that a governmental entity may be held strictly liable if the "taking" constitutes a *substantial cause* even if only one of several concurrent causes of the Plaintiff loss.

"While there is no judicially approved definition of what is a substantial factor for causation purposes, it seems to be something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result." (BAJI, January 1994 Pocket Part for 7th Edition, Vol. I, pg. 41, comment). The California supreme Court referencing the term "substantial factor" in a criminal case stated:

> "No cause will receive judicial recognition if the part it played was so infinitesimal or so theoretical that it cannot be regarded as a substantial factor in bring[ing] about the particular result." (*People v. Caldwell* (1984) 36 CA3d 210, 220).

The gist of the First Amended Complaint paragraphs 18, 19 and 20, and all of the testimony and evidence adduced at trial on behalf of the Plaintiff is that the rent increases should have been granted as of February 22, 1990 but were not received until forced out of the Board by the successful mandate petition on or about August 1, 1990, a delay of approximately 6 months; that as a direct and proximate result of the delay and the failure of the Defendant to certify Petitioner's rent increases, Plaintiff lost its properties through foreclosure.

Was, then, the failure of the Board to grant the increased rents in the amounts requested by Plaintiffs as of February 22, 1990 coupled with an approximately six months delay thereafter before granting the increases as ordered by Judge Knight, a "substantial factor" or a "substantial cause" of Plaintiffs loss of its property by foreclosure in 1991.

The evidence discloses that in 1986, 1987 and 1989 Plaintiff had several times defaulted on its loan obligations such as to have caused its lender, Home Savings, to execute several Notices of Default. Plaintiff had been able to at least limitedly satisfy each of these notices prior to August of 1989. By the time Plaintiff filed its applications for rent increases with the Board in August and September of 1989, all 124 units were

again in default to the tune of some $259,000. This sad state of affairs was in fact what precipitated Plaintiffs application for Annual General Adjustments (AGA) and Individual Rent Adjustments (IPA). The loan payments at the time were approximately $43,000 a month. Plaintiffs sought rent increases of approximately $27,000 a month. Mathematically the granting of such increases would still have left Plaintiffs short same $16,000 a month.

In their efforts to stay alive Plaintiffs during the fall of 1989 renegotiated their loans with Home Savings such that the above arrearage was added to, incorporated in and became part of the principle of the loans; Plaintiffs were required to pay some $64,000 by February of 1990 on account of the arrearages; and commencing in October of 1989 the monthly payments would be interest only of approximately $30,000 a month plus a $6,000 monthly deposit in a tax impound account, a total of $36,000 per month. Once again Plaintiffs cash flow would still have been insufficient even with the increased rents to service the renegotiated monthly mortgage requirements.

However, Plaintiffs had available to them other resources and did further capitalize the partnership to the tune of approximately $100,000 and had available approximately an additional $225,000 to apply towards curing the defaults. For whatever reasons, however, Plaintiffs chose not to apply this $225,000 to keeping these 124 apartment units afloat.

The rents which were being paid, on the other hand, did provide some cash flow which was allocated against the monthly accruals. The amount thereof was still insufficient to fully amortize the $36,000 needed each month as by the summer of 1990 the renegotiated payments were again in default and by the end of 1990 a judicial foreclosure proceeding had been instituted against the Plaintiff's by Home Savings.

In 1982 and 1983 Plaintiff purchased the 124 units for a total of $3,500,000. Most of the purchase price was by way of

promissory notes and deeds of trust. In October 1985 Plaintiff refinanced all of the units and in so doing borrowed a total of $5,025,000. This resulted in cash of approximately $900,000 being made available to Plaintiff. Three hundred thousand dollars of this was set aside in an operating reserve for the units and $600,000 was distributed $200,000 to each of the 3 partners in Plaintiff. The amounts so distributed were understood to be kept available by the partners for capital reinfusion if it became necessary.

The capital reinfusion did become necessary and clearly Joseph Horwath contributed his portion thereof. It is not absolutely clear but seems reasonable to infer that Anthony Horwath did likewise. It is less clear that Anton Horwath contributed his $200,000 when called upon at a later date.

Throughout the 1989-90 period Plaintiff endeavored in many ways to stall the constantly recurring threats of foreclosure. Plaintiff attempted to negotiate a sale of at least one of the properties to Vinod Bansal; Plaintiff attempted to refinance through Fidelity Savings and Loan; Plaintiff successfully negotiated a "stand still" agreement with Home Savings; Plaintiff sought rent increase authority from the Board to an amount which would adequately provide (as required by statute) for the property to generate an appropriate Net Operating Income (NOI); Plaintiff joined with other apartment house owners in the area to engage a private security service in an effort to reduce crime and violence on the street; Plaintiff actively participated in governmental efforts to increase the economic viability of the City of East Palo Alto and to participate in various public service affairs in order to increase the attractiveness of rental units on the street.

The Writ of Mandate issued by Judge Knight in a sense was a default against the Defendants in that their Regulation 1241 provides that in the event of failure to act within the time specified rent increases *in the amount applied for* shall be granted. It does not matter whether these amounts are realistic

or unrealistic. The writ simply ordered the Board and the City to allow rents up to the maximum requested. The writ in no way made any determination that such rents would be obtainable in the real world of applicable market forces.

Two experts testified—one for the Plaintiff and one for the Defendant—that the rents allowed pursuant to the writ were not obtainable under the then current market situation for apartments of these types and in this location. Assuming 100% occupancy, the best rental increase which could have then been anticipated was only approximately $23,000 a month rather than the $27,000 authorized by the writ. Both experts testified that there was a bad combination of economic and social circumstances affecting the area in 1989 and 1990. The United States had entered upon its general recession by that time which was particularly being felt in California. The Tax Reform Act of 1986 had impacted the ability of multiple family unit owners to obtain capital gains treatment in the event of a sale and/or various loss carry forward benefits. The savings and loan crisis was upon us making it difficult to obtain financing. The supply of apartments on the San Francisco peninsula exceeded the demand therefor. The City of East Palo Alto was in terrible political turmoil, one budgetary crisis followed another, and police enforcement was in dire straits.

The Plaintiffs' Anthony and Joseph Horwath themselves testified and evidence was adduced against them by the Defendants that crime, violence and property degradation on O'Keefe Street were rampant and increasing. It was difficult to find responsible tenants willing to pay a reasonable rental. About the only new tenants who could be acquired were welfare and AFDC recipients.

The consequence was that even after finally getting the new rental certificates approximately August 1, 1990, Plaintiff's were able to increase the monthly rents only by some $2,400 rather than the $27,000 authorized by the writ and the $23,000 monthly increase which the two experts felt might

have possibly been attained. The end result was bankruptcy (Chapter 11) of the Plaintiff in January of 1991. This ultimately led to a deed in lieu of foreclosure being executed by the Plaintiff transferring title of the subject properties to the lender, Home Savings, approximately a year later.

The loss of the property through the foreclosure proceedings was therefore caused by a multitude of factors. One of those factors was the inability of the Plaintiffs to obtain a reasonable return on their investment and a reasonable NOI. Irrespective of the failure of the Board to allow any IRA's by February 22, 1990, the ordinance and regulations did mandate a blanket AGA of approximately 4.9% or $4,672.00 per month. The effective date of such because of CC §827 would have been April 1, 1990. Assuming that the certificates were in fact not issued pursuant to the writ until sometime during the month of July 1990, and mailed to Plaintiff July 31, 1990, the earliest effective date of the AGA's would then have become October 1, 1990—a delay of six months.

No evidence was adduced that the rents could not have been raised at least the minimum of these AGA adjustments. The ratio therefore of the AGA increases to the maximum possible rental increases pursuant to the testimony of the experts of $23,000 (including AGA and IRA increases adjusted by what the market would bear) is 20.3%. The total amount of AGA monthly increase of $4,672.00, would obviously not have cured Plaintiff's entire operating deficits. It would have helped however.

The ultimate test of what rent the Plaintiffs could reasonably obtain for the units after the belated receipt of the certificates, however, is in fact what the Plaintiffs thereafter did to increase the rents. In some instances Plaintiff increased the rent slightly more than the allowed AGA levels, in some instances less than it, in some instances not at all, and in no instances an amount equal to that which the experts testified might be possible under market conditions then existing.

Particularly, Plaintiff did not raise any of the rents to the level authorized by the writ and asked for by Plaintiff in its original increase applications of August and September 1989. As acknowledged by Anthony Horwath in his letter to Home Savings of July 8, 1991 (Exhibit M) the area had deteriorated so badly it was simply impossible to obtain even minimal reasonable rents.

By the end of 1990 the prospective mitigating sale to Bansal had fallen through. Although not entirely clear, it appears that this was because of the refusal of Home Savings to allow Bansal to assume the note and deed of trust on the property he was attempting to purchase. There was no evidence presented that such refusal was in any way related to the failure of the City/Board to issue rent certificates on February 22, 1990. A more reasonable inference is that Bansal simply did not qualify pursuant to the loan standards/criteria of Home Savings.

Likewise, there was no evidence that the failure of the Fidelity refinance in December 1990 was the result of the non-issuance of the certificates in February 1990. On the contrary, by December 1990 the maximum authorized rent increase certificates had been issued and the appeal by the City/Board from the Writ of Mandate had been abandoned and the certificates were thereupon final and non-appealable (a requirement of Fidelity).

The ultimate loss of the property seems to have been inevitable as a result of a large number of factors starting with the refinancing of the properties in 1985, the incorporation of the City of East Palo Alto, the adoption of the rent control ordinance by the City, certain increases and then rollbacks in allowed rentals, the recession in the economy, the political turmoil in East Palo Alto, the breakdown of public safety in East Palo Alto, the inability of Plaintiff to consistently obtain close to 100% occupancy, the crime, violence and degradation of property values in the area, the savings and loan problems of

the times, and numerous other socio-economic problems of the era and of the area. The most that can be said for Plaintiff's case therefore is that the failure of the City/Board to comply with their own ordinance and regulations by February 22, 1990 caused a *temporary* "taking" of property and even a temporary "taking" requires just compensation (*First English Evangelical Lutheran Church v. Los Angeles* (1987) 482 US 384).

Plaintiff 's needed $36,000 a month additional rent as a minimum to stay afloat under the renegotiated agreement with Home Savings. Even the minimum AGA increases authorized pursuant to the writ (and which seem to have been reasonably obtainable) would have provided increased rents of only $4,672.00 per month maximum. This increase would not have permanently cured Plaintiffs problems and the property most likely ultimately would have been lost via foreclosure. A reasonable inference, however, is that the receipt thereof perhaps would have forestalled foreclosure and given the Plaintiff's an opportunity to consummate the Bansal sale, the Fidelity refinancing, or some other proposition to salvage their project. The inability to receive $4,672.00 against a need of $36,000 per month (almost 13%) is not insignificant nor trivial and constitutes a substantial factor in causing at least a temporary loss to Plaintiff.

ISSUE: DAMAGES

No permanent damages can be awarded. To do so would be to engage in pure speculation. Market forces, environmental forces, habitability problems, societal problems, financing problems, and the clearly demonstrated inability to obtain the maximum IRA plus AGA eventually allowed versus the amount of money needed to cure defaults and to maintain a current status make it impossible to determine that the six month delay in obtaining the maximum rental allowances was a substantial factor in causing the foreclosure (or deed in lieu of foreclosure) loss of the property.

Conversely, there was a temporary taking by virtue of the failure of the Board to grant at least the AGAs by February 22, 1990 which caused a monthly loss of $4,672.00 to Plaintiffs, all to their damage in the sum of $28,032.00 for which they are entitled to be compensated.

AFFIRMATIVE DEFENSES

From the foregoing recitals it is clear that the affirmative defense of failure to state a cause of action is inapplicable.

The fifth affirmative defense of a valid exercise of police powers is likewise inapplicable. While the creation of the rent ordinance and its regulations was a permissible governmental activity, the failure of the Defendants to abide by their own ordinance/regulations negates entirely the declination to act being a proper exercise of police powers.

No evidence of any nature whatsoever was presented to support the sixth affirmative defense of estoppel.

The eighth affirmative defense of a failure to mitigate damages is completely unsupported by any evidence. To the contrary, the evidence is clear that the Plaintiff made every reasonable effort to mitigate its damages.

ATTORNEY FEES

Both sides requested an award of attorneys fees herein.

CCP §1235.140(b) makes provision for an award of attorneys fees to the property owner in eminent domain proceedings. Inverse condemnation is a type of eminent domain action.

Plaintiffs are accordingly entitled to their reasonable attorneys fees as a portion of their litigation costs upon their making a proper motion therefor.

CONCLUSION

Judgment shall be entered herein in favor of the Plaintiff in the sum of $28,032.00 for the uncompensated temporary taking of their property by the Defendants, together with interest thereon at the rate of 7% per annum from February 22, 1990 to the date of judgment, and Plaintiffs litigation costs, including therein reasonable attorneys fees.

Unless either party requests a further statement of decision as provided by the Code of Civil Procedure and the California Rules of Court, the foregoing shall constitute the Court's Statement of Decision. In the event a further written statement is requested, same shall be prepared by counsel for Plaintiff.

DATED: **[Illegible]**

/s/ Harlan K. Veal
JUDGE OF THE SUPERIOR COURT

Appendix C-1

Filed 7/17/96

First Appellate District, Division Five, No. A067695
S054159

IN THE SUPREME COURT OF CALIFORNIA

HORWATH ASSOCIATES, Appellant

v.

THE CITY OF EAST PALO ALTO et al., Respondents

Appellant's petition for review GRANTED.

Submission of additional briefing, otherwise required by rule 29.3, California Rules of Court, is deferred pending further order of the court.

George
Chief Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

Associate Justice

Associate Justice

Appendix D-1

Filed 11/24/97

First Appellate District, Division Five No. A067695
S054159

IN THE SUPREME COURT OF CALIFORNIA

HORWATH ASSOCIATES, Appellant

v.

THE CITY OF EAST PALO ALTO et al., Respondents

Review was granted in this matter on July 17, 1996, and briefing ordered deferred pending disposition of the appeal in *Kavanau v. Santa Monica Rent Control Board*, which was filed on August 26, 1997, and became final on September 26, 1997. (16 Cal. 4th 761.)

The court has now determined that briefing and further action in the above-entitled case shall be deferred pending disposition of the appeal in *Landgate, Inc. v. California Coastal Commission* (S059847).

/s/ George
Chief Justice

Appendix E-1

Filed 7/8/98

First Appellate District, Division Five, No. A067695
S054159

IN THE SUPREME COURT OF CALIFORNIA

HORWATH ASSOCIATES, Appellant

v.

THE CITY OF EAST PALO ALTO et al., Respondents

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate Distict, Division Five.

George
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Werdegar
Associate Justice

_____
Associate Justice

_____
Associate Justice

_____
Associate Justice